UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 2 1992

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: RCRA Post-Closure Permits for Regulated Units at NPL Sites

FROM: Don R. Clay
Assistant Administrator

TO: Patrick Tobin
Deputy Regional Administrator
Region IV

Thank you for your inquiry regarding the ability to issue post-closure permits to RCRA regulated units at NPL sites. Attached you will find a final legal analysis from the Office of General Counsel (OGC). Based on the legal interpretation, I conclude that CERCLA 121(e)(1) does not eliminate the need to secure a RCRA permit where the facility is required to obtain such a permit due to the presence of a RCRA Subtitle C treatment, storage or disposal unit that was not created by the CERCLA action.

This interpretation is consistent with Agency policy that EPA has the discretion to use its authorities under CERCLA, RCRA, or both to accomplish appropriate cleanup action at a site, even where the site is listed on the NPL. The integration of these authorities should be applied on a case by case basis, taking into account Regional priorities, to avoid duplication of efforts where possible. Some options for integration include:

- o adding language to the RCRA post-closure permit that establishes a schedule of compliance (as allowed under RCRA section 3004(u)), according to which the appropriate corrective action would be determined after completion of the CERCLA action. If a thorough CERCLA response is carried out, there should be no need for further action when the site is reviewed under RCRA.

- o dividing responsibilities in the Interagency Agreement, focusing CERCLA activity only on certain prescribed units. This could leave cleanup of other units under the direct control of RCRA authorities. This may be appropriate where the RCRA regulated unit is

physically distinct from the CERCLA contamination and its cleanup would not disrupt CERCLA activities.

o avoiding potential overlap by drafting a RCRA permit that references the CERCLA cleanup actions. For instance, in light of the requirement in a Federal Facilities Agreement to achieve cleanup under CERCLA that is protective of human health and the environment, the corrective action condition in the RCRA permit could be written to reflect the fact that corrective action is unnecessary, as long as the permittee complies with the conditions in the Federal Facility Agreement.

We hope that you find the above interpretation useful. If you require any additional information, or have any questions, please feel free to contact me.

Attachment

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 10 1992

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: RCRA Post-Closure Permits for Regulated Units at NPL Sites

FROM: Lisa K. Friedman
Associate General Counsel
Solid Waste and Emergency Response Division (LE-132S)

TO: Don R. Clay
Assistant Administrator
Solid Waste and Emergency Response (OS-100)

As you requested, this memorandum will respond to the legal issues raised by Region IV in their January 24, 1992 memorandum to you. The Region's questions concern the applicability of RCRA post-closure permit requirements at CERCLA sites, in light of the permit waiver in CERCLA section 121(e)(1).

BACKGROUND

The Department of Energy (DOE) has a number of RCRA "regulated units" at its Oak Ridge facility in Tennessee, including hazardous waste surface impoundments, land treatment units, and landfills that received hazardous waste after July 26, 1982 and certified closure after January 26, 1983. (None of these regulated units were created as part of a CERCLA removal or remedial action.) As required in the RCRA regulations at 40 CFR 270.1(c), DOE filed applications for post-closure permits for some of the units, although it has now ceased that effort in light of CERCLA activities at the site, discussed below.

Pursuant to CERCLA section 120, EPA and DOE entered into a Federal Facility Agreement (FFA) for the Oak Ridge site on November 13, 1991, under which the site (which is included on the National Priorities List) would be cleaned up under CERCLA; as part of the CERCLA action, the FFA specifically requires the attainment of RCRA requirements that are found to be applicable or relevant and appropriate requirements (ARARs).

DOE has taken the position, based on CERCLA section 121(e)(1), that RCRA permits are not necessary or required at NPL sites and that instead, RCRA requirements for groundwater protection and post-closure care need to be met only to the extent they constitute ARARs for the CERCLA response action at the facility; DOE further argues, based on the decision in United States v. Colorado (D.Colo. Aug. 14, 1991) that the State has no authority to enforce RCRA permit requirements at an NPL site. Region IV takes a contrary position, arguing that DOE has an obligation to apply for and obtain post-closure permits for non-CERCLA, RCRA-regulated units at Oak Ridge. The Region notes that RCRA permitting requirements were triggered by DOE's decision to operate and close these specific types of hazardous waste management units beyond key dates established in RCRA regulations.

In addition to the legal issue, DOE expressed the practical concern that a requirement to study and respond to groundwater contamination at individual RCRA units as part of separate post-closure permits, rather than addressing the site groundwater in its entirety under CERCLA, would not be efficient or cost-effective.

Region IV has raised three specific questions for Headquarters' review.

DISCUSSION

Question 1: Does CERCLA section 121(e)(1) relieve DOE from the requirement to apply for post-closure permits at NPL sites and instead require RCRA 40 CFR 264 standards for post-closure care and groundwater protection be considered as ARARs in a ROD?

No; CERCLA does not relieve DOE from the requirement to obtain post-closure permits for pre-existing, RCRA-regulated units at NPL sites. CERCLA section 121(e)(1) provides that:

> No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section.

Thus, no permits need to be obtained in order to conduct a remedial action "selected and carried out in compliance with" CERCLA section 121, even if that action will involve the treatment, storage or disposal of hazardous waste. However, this does not eliminate the need to secure a permit where the facility is required to obtain a permit due to the presence of a RCRA Subtitle C treatment, storage or disposal unit that was not created by the CERCLA action.

Of course, any remedial action selected for the site under CERCLA section 121 would have to attain (or waive) the substantive standards set out in RCRA 40 CFR 264, to the extent they are determined to be ARARs.

The decision in United States v. Colorado (D.Colo. Aug. 14, 1991) does not change this analysis. In that case, Colorado was attempting to enforce a closure plan under RCRA that was in conflict with a cleanup plan under CERCLA; the district court found, in effect, that in order to evaluate whether or not to enforce Colorado's claim, he would have been required to review EPA's remedial action decision under CERCLA -- such review is barred by CERCLA section 113(h). The Colorado decision does not limit the ability of a state to issue, and seek to enforce, RCRA orders or permits that do not conflict with the CERCLA-selected remedy.

This analysis is further supported by the fact that RCRA "facilities" and CERCLA "sites" are not necessarily coterminous. In cases where the CERCLA site is only a portion of the RCRA facility (e.g., consisting of several of the larger solid waste management units), the corrective action portion of the RCRA permit must be available to address the contamination that is subject to RCRA only. However, if in that example the permitted unit were on the CERCLA site, and if RCRA requirements could not be enforced at RCRA-regulated units on a CERCLA site (as DOE argues), then the RCRA permit's ability to address releases at solid waste management units of the RCRA facility would be improperly prevented; this cannot be correct.

EPA has recognized that where there are corrective action requirements in a RCRA post-closure permit and remedial action requirements a CERCLA decision document, there is the potential for conflict or overlap between the two authorities in addressing contamination problems (see NPL Listing Policy for Federal Facilities, 53 Fed. Reg. 10520, 10522-23 (March 13, 1989) (attached)). As the Agency noted in the preamble to the 1990 revisions to the NCP,

> EPA ... has the discretion to use its authorities under CERCLA, RCRA, or both to accomplish appropriate cleanup action at a site, even where the site is listed on the NPL. (See 54 FR at 41009 (Oct. 4, 1989).... In the context of federal facility cleanups, this decision, and the cleanup plan in general, would be discussed in the Interagency Agreement (IAG) for the facility.

55 Fed. Reg. 8666, 8698 (March 8, 1990). The Agency has a number of options for harmonizing operation of the two authorities and avoiding duplicative orders and overlaps.

First, any conflict or overlap could be avoided by establishing a timing sequence for evaluation of site problems under RCRA and CERCLA. For instance, the RCRA post-closure permit could establish a schedule of compliance (as allowed under RCRA section 3004(u)), according to which the appropriate corrective action would be determined after completion of the CERCLA action; if a thorough CERCLA response is carried out, there will be no need for further action when the site is reviewed under RCRA. Such a provision in a RCRA permit might read as follows:

> In light of the requirement in the FFA to achieve a cleanup under CERCLA that is protective of human health and the environment, corrective action under this permit shall be determined according to the following schedule: after the work called for in the FFA has been completed, the need for any further corrective action, under this permit, shall be evaluated. Such further corrective action shall be limited to action required based on new information or conditions, not available at the time of the remedy selection under the FFA, that render the FFA remedy no longer protective of human health or the environment.

Similarly, the CERCLA decision document could delay its review of certain units (or "carve out" those units) while action proceeds under RCRA; such areas would then be revisited under CERCLA after the RCRA action has been completed, as part of the review of the site for possible deletion from the NPL. As EPA explained in the NPL Listing Policy for Federal Facilities,

> In some circumstances, it may be appropriate under an [Interagency Agreement] to divide responsibilities, focusing CERCLA activity only on certain prescribed units, leaving the cleanup of other units under the direct control of RCRA authorities, such as where the RCRA-regulated hazardous waste management unit is physically distinct from the CERCLA contamination and its cleanup would not disrupt CERCLA activities.

53 Fed. Reg. at 10523. It is generally expected that sites cleaned up under RCRA would qualify for "no action" under CERCLA. (This approach is discussed in your memorandum, "Requirements for Cleanup of Final NPL Sites Under RCRA" (Don R. Clay, July 11, 1990) (attached).)

Alternatively, a potential overlap could be resolved by drafting a RCRA permit that references the CERCLA cleanup actions. For instance, the corrective action condition of the RCRA permit could be written to say:

> In light of the requirement in the FFA to achieve a cleanup under CERCLA that is protective of human health and the

> environment, corrective action under the permit is unnecessary, as long as the permittee complies with the conditions in the FFA, including modifications thereto.

In situations like Oak Ridge, where there are interconnected groundwater plumes rather than distinct source units, EPA has stated that it is generally most appropriate to address the contamination comprehensively under an enforceable agreement under CERCLA (e.g., an FFA), see 53 Fed. Reg. at 10523, and to use mechanisms like those discussed above to have the RCRA permit take into account the CERCLA action.

Finally, the Agency recognizes that there may be cases where a RCRA-authorized State declines to coordinate RCRA cleanup actions with an on-going CERCLA action, and a conflict may occur that cannot be resolved through discussions. In that case, EPA may resolve the conflict using CERCLA section 122(e)(6), which prohibits a PRP from taking remedial action at a CERCLA site without EPA's authorization[1]:

> Inconsistent Response Action -- When [an RI/FS has been initiated] for a particular facility under this Act, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

EPA has interpreted this authorization requirement to extend to PRP remedial actions ordered by a State. See discussion at 53 Fed. Reg. 10523. Thus, once an RI/FS has been initiated, EPA can deny a PRP authorization to comply with a State order or permit calling for remedial action at the CERCLA site.

Of course, EPA also has the discretion under section 122(e)(6) to allow the PRP to implement the State-ordered remedy; this might be appropriate where, for example, the State-ordered cleanup activities would be consistent with, or distinct from, the CERCLA action. To our knowledge, the Region has not yet made any decisions under the CERCLA section 122(e)(6) authorities.

> Question 2: Does the Tennessee Department of Environment and Conservation (TDEC) reserve its rights to require DOE to apply for post-closure permits if DOE fails to fulfill its obligation to conduct timely remedial investigations and remedial actions (schedules to be negotiated pursuant to the FFA) for certain RCRA regulated units at Oak Ridge Reservation (ORR)?

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[1] In the Superfund Executive Order, No. 12580, the President's authority under CERCLA section 122(e)(6) for NPL sites has been delegated to EPA. See E.O., Section 4(d)(1). See also discussion at 54 FR at 10523, n. 10.

The answer to the question of whether TDEC has "reserved" specific rights depends on the language agreed to by TDEC in the FFA as well as the language of the post-closure permit and applicable State regulations. (Clearly if TDEC incorporated a schedule of compliance into the permit, then it would have reserved its right to at least review the site after the CERCLA action has been completed to determine if any permits or other action are necessary under RCRA; similarly, if the permit included a permit condition stating that "corrective action under the permit is unnecessary as long as the permittee complies with the conditions in the FFA," the failure to comply with the FFA could trigger a review of RCRA responsibilities.) However, as explained above, it is clear that the simple issuance of an FFA for the Oak Ridge site does not, without more, act to preempt the effect of permits required under RCRA (including RCRA-authorized State law) for non-CERCLA activities.

The continued applicability of RCRA permitting requirements appears to have been contemplated by DOE and EPA in the FFA for Oak Ridge. Section IV, C. of the FFA provides that:

> ongoing hazardous waste management activities at ORR [Oak Ridge Reservation] may be subject to or require the issuance of additional permits under Federal or State laws. This agreement does not relieve the DOE of its obligations, if any, to obtain such permits. This Agreement does not supersede, modify, or otherwise change the requirements of the DOE's existing RCRA permits.

Question 3: Does EPA have discretionary authority to disallow entirely, or limit the CERCLA section 121(e)(1) permit waiver provision to ensure that NPL and non-NPL RCRA facilities are treated equitably?

CERCLA section 121(e)(1) provides that no federal, State, or local permit "shall be required" for CERCLA response actions, thereby effectively limiting EPA's ability under the statute to require a PRP to obtain a permit for a CERCLA response action.

However, this does not mean that a PRP may not have an obligation to comply with a permit issued with regard to matters other than the CERCLA response action. For example, where a facility has a pre-existing NPDES discharge permit related to on-going activities distinct from the CERCLA actions, that permit remains in force even if the site is listed on the NPL and an RI/FS is initiated under CERCLA. In addition, if obligations under a preexisting permit would overlap with planned CERCLA activities, EPA could authorize a PRP, under CERCLA section 122(e)(6), to carry out remedial actions called for in an order or permit issued under another federal or State law.

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If you have any questions concerning these responses, or would like to discuss the issues further, please contact me (260-7697) or Larry Starfield of my staff (260-1598).

Attachments